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In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 57

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
Petitioner

v.

JOHN FOSTER DULLES, as SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,

Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 643

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
Petitioner

v.

JOHN FOSTER DULLES, as SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 56-62; Pet. App. 18-24) is reported at 236 F. 2d 885. The opinion of the district court (R. 47-51; Pet. App. 13-17) is reported at 133 F. Supp. 160.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1956 (R. 63). The petition for a

writ of certiorari was filed on December 21, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, born in China of a United States citizen father, lost his citizenship under sections 201 (g) and (h) of the Nationality Act of 1940 by failure to apply for, or take up, residence in the United States prior to his sixteenth birthday on July 16, 1951, at which time the consulate in Hong Kong, where petitioner resided, had been receiving travel applications for five years.

2. Whether sections 301 (b) and (c) of the Immigration and Nationality Act of 1952, which permit retention of American citizenship by persons born abroad provided they come to the United States prior to their twenty-third birthday, was inapplicable to petitioner by reason of his previous loss of citizenship under sections 201 (g) and (h) of the Nationality Act of 1940.

STATUTES INVOLVED

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U.S.C. 601 (1946 ed.)) provided:

> The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were

after attaining the age of sixteen years, the other being an alien: *Provided,* That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

* * *

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

The above provisions were repealed by section 403(a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 280.

Section 301 of the Immigration and Nationality Act of 1952 (66 Stat. 235; 8 U.S.C. 1401) provides as follows:

(a) The following shall be nationals and citizens of the United States at birth:

* * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or

periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

Section 405(c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U.S.C. 1101 note) provides as follows:

Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

STATEMENT

Petitioner filed in the United States District Court for the Eastern District of Wisconsin a complaint for declaratory judgment seeking recognition of alleged United States citizenship (R. 2-13). The substance of the petition was as follows:

Petitioner was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States (R. 3, 4, 6). In 1936 petitioner's father returned to the United States where he had permanent residence in Milwaukee, Wisconsin (R. 4). Petitioner's mother died on March 3, 1945, and he was left under the care of her relatives at Hong Kong (R. 5, 57).

From December 7, 1941, through December 26, 1946, the United States Consulate at Hong Kong was closed to applications for travel papers for the purpose of coming to the United States (R. 4). Petitioner alleged that because of conditions beyond his control he was prevented from making application for travel to the United States before his sixteenth birthday on July 16, 1951. These conditions were said to include unsettled post-war emergency conditions in Hong Kong, and the inability of petitioner and his father to raise funds for his trip to the United States (R. 8-9, 31-32). On October 17, 1951, and again on December 11, 1951, petitioner's application for travel to the United States was disapproved by the con-

sulate at Hong Kong on the ground that it had not been timely filed before petitioner's sixteenth birthday (July 16, 1951), and he had lost his United States citizenship (R. 8-9).

On motions for summary judgment the district court dismissed the complaint (R. 25-26, 41, 52). The decision (Pet. App. 13-17) was to the effect that, under sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2-3), petitioner had lost his American citizenship by failing to take up residence in the United States prior to his sixteenth birthday, and that the limitation of the statute was not tolled by lack of proper financing or troubled world conditions. On appeal (R. 53) the Court of Appeals affirmed (Pet. App. 18-25).

DISCUSSION

1. There can be little question but that petitioner lost his right to citizenship under sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2-3) by reason of failure to apply for, or take up, residence in the United States prior to reaching the age of 16 years on July 16, 1951. The 1940 Act granted citizenship at birth to a child born in a foreign country if one parent was a United States citizen and certain residence requirements were met. This grant of citizenship, however, was not absolute but subject to the conditions subsequent that such a person, in order to achieve "retention" of his citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years," and that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches

the age of sixteen years * * * his American citizenship shall thereupon cease." Petitioner did not comply with these conditions subsequent and therefore lost his citizenship, since it is undisputed that he did not establish a residence in this country prior to his sixteenth birthday, and did not even apply for travel facilities before that date.

The issue which petitioner attempts to raise, as to whether the requirement for taking up United States residence prior to the sixteenth birthday may be tolled where conditions beyond the child's control make it impossible for him to comply with the statute, is not presented by this case. Petitioner, his father, and his mother's relatives had ample opportunity from 1946 to 1951 to petition the Hong Kong Consulate for travel papers in order to keep alive his claim for retention of citizenship. Even if they did not have sufficient finances for a trip in 1946, they could at least have made application for travel documents, with the hope of raising money later. Petitioner's failure to make any timely application for travel to the United States was not involuntary in any real sense of the word. Moreover, the fact that the United States Consulate in Hong Kong was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of *six* and *eleven*, certainly could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday. It should also be noted that under the 1940 Act the five years' residence in the United States had to occur after the age of thirteen.

Petitioner's strong reliance upon *Lee Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Cal), is misplaced.

There, completely unlike the situation here, plaintiff made application to the American Consulate at Hong Kong "for travel documents more than five months prior to his sixteenth birthday," but by reason of the State Department's unwarranted delay they "were issued only 37 hours prior to the beginning of the day on which plaintiff would attain the age of sixteen" (110 F. Supp. at 63). For these reasons it was held that the plaintiff had substantially complied with section 201(g) by making a bona fide attempt to take up timely residence in the United States.

Petitioner also relies upon *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3), and *Peduzzi* v. *Brownell*, 113 F. Supp. 419 (D. D.C.), arising under section 401(a) of the Nationality Act of 1940, which provides that an American child who acquires foreign nationality through a naturalized parent is required to come to the United States within two years after majority or lose his American citizenship. In each of these cases, however, the statute was deemed tolled since World War II was being waged and consulates were closed during most of the pertinent time interval. Furthermore, a short two-year statute, instead of the much longer period provided in section 201(g), was involved. As the district court appropriately observed here (Pet. App. 15), "It should be noted that the Second World War did not directly interfere with [petitioner's] coming to the United States before he was sixteen years old."

2. The real issue in this case is whether, although petitioner had lost his citizenship under the 1940 Act, section 301(b) and (c) of the 1952 Act (*supra*, p. 4.) gave him an opportunity to regain that

citizenship by coming to the United States before he was twenty-three years of age. Section 301(c) of the 1952 Act states that the rule as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934" (as was petitioner). However, section 405(c) of the 1952 Act provides:

> Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

On the face of the statute, reading the two sections together, it would appear that, as the court below held, section 405(c) operates to render inapplicable to petitioner, who had already lost his citizenship (in 1951) before the effective date of the 1952 Act (December 1952), the provisions of section 301(c). This Court's decision in *United States* v. *Menasche,* 348 U. S. 528, interpreting the savings clause in section 405(a) of the 1952 Act, indicates that, to come within the "except as otherwise specifically provided" proviso of a general savings clause, the section relied upon for the exception must clearly express that intention. See also *Wong Kay Suey* v. *Brownell,* 227 F. 2d 41 (C.A. D.C.), certiorari denied, 350 U. S. 969, where the court held that section 360(a) of the 1952 Act, which states that it is to apply to proceedings under "this or any other act," is not a clause which "otherwise specifically provided," so as to render inapplicable the general savings clause. Section 301(c), involved

here, seems to us to show on its face less purpose to render the savings clause of section 405(c) inapplicable than the sections involved in either *Menasche* or *Wong Kay Suey* as to the comparable savings clause of section 405(a).

There is, however, support in the legislative history for petitioner's position that section 301(b) and (c) of the 1952 Act were intended to be applicable to all children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in the broad study of the working of the immigration and nationality laws represented by Senate Report 1515, 81st Congress, 2d Session, which was filed by the Senate Committee on the Judiciary on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday. The committee report stated, p. 713:

> The subcommittee finds that the provisions of existing law relative to citizenship of children born abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.
>
> *Inasmuch as* adjudication and *determination of cases coming under the provisions of existing law have not yet begun,* the subcommittee recommends that the proposed new law be made *retroactive* to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 act. [Emphasis added.]

In the intervening two years, during which this recommendation was carried over in various bills which finally became the Immigration and Nationality

Act of 1952, no mention was made of the fact that the situation had changed and that some children born after 1934 could have (and, like petitioner, had) lost citizenship before the 1952 Act became effective. But some further support is given petitioner's position by the detailed analysis and comment prepared by the Immigration and Naturalization Service, to which reference is made in Senate Report 1137, 82d Congress, 2d Session, p. 3, and House Report 1365, 82d Congress, 2d Session, pp. 27-28. This analysis from the Immigration and Naturalization Service states, at page 301-5:

> Although subsection (b) refers specifically to persons born abroad *who are citizens* under paragraph (7) of subsection (a), the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to *all persons* born abroad subsequent to May 24, 1934. [Emphasis added.]

No express language was written into the Act to restore the citizenship which was lost between the time of Senate Report 1515 (in April 1950) and the effective date of the Act (in December 1952). Strictly construed, the provision of section 301(c) (*supra*, p. 4) that the new rule as to *losing* citizenship shall apply to a person born after May 24, 1934, says nothing about *restoring* citizenship already lost.

The history of the savings clause in section 405(c) fails to throw any light on the subject. All the bills introduced had some similar form of savings clause, but the introductory phrase of the final draft, *i.e.*, the "except as otherwise specifically provided" clause, was not inserted until the conference. House Report

2096, 82d Congress, 2d Session. No explanation appears in the reports or debate.[1]

The issue thus becomes whether the intention expressed in Senate Report 1515 in 1950 can be said to bring section 301(b) and (c) of the 1952 Act within the "except as * * * specifically provided" clause of section 405(c). The government in *Menasche* and *Wong Kay Suey* took the position, and it is currently taking the position in *Lehmann* v. *Carson*, No. 72, this Term, and *Mulcahey* v. *Catalanotte*, No. 435, this Term (as to section 241(d) relating to grounds of deportation), that the determination of whether a particular section comes within the "otherwise specifically provided" clause of a general saving clause, requires not any particular form of language, but rather only a clear expression of congressional purpose. Should this view be adopted, there would be substantial (though not conclusive) grounds for holding that section 301(c) should be construed as making the more liberal terms of the 1952 Act available to all persons born after May 24, 1934, including those who lost their citizenship between May 24, 1950, and December 24, 1952, the effective date of the 1952 Act.

Since, however, the language of section 301(b) and (c) does not have the explicit wording which may be required by the *Menasche* and *Wong Kay Suey* opinions—and in fact is not as specific as the language

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[1] It cannot be assumed that the phrase "except as otherwise specifically provided" was inserted in section 405(c) solely to take care of persons whose citizenship was to be restored by section 301(c), since it appears that citizenship was to be restored under at least one other provision, section 354(1).

involved in Nos. 72 and 435—we suggest that the Court may wish to withhold disposition of this case until it has passed upon Nos. 72 and 435.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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